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CITATIONS

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Constitution, Statutes and Regulations:

QUESTION PRESENTED

Whether the Court of Claims erred in suspending proceedings in a suit for a money judgment arising out of an adverse determination relating to authorization for access to classified information, pending pursuit by petitioner of his administrative remedies before the Department of Defense.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent parts of the Fifth Amendment, of the Tucker Act, 28 U.S.C. 1491, and of the applicable regulations of the Department of Defense are set forth in the Appendix, *infra*, pp. 30–39.

STATEMENT

The facts comprising the background of this litigation are fully set forth in this Court's opinion in *Greene* v. *McElroy*, 360 U.S. 474, 476–491.

In 1951 petitioner was vice-president and general manager of Engineering and Research Corporation (ERCO). On December 11, 1951, he was informed by the Army-Navy-Air Force Personnel Security Board (PSB) that his authorization for access to classified information was being preliminarily revoked pending a hearing before the Industrial Employment Review Board (IERB). Petitioner appeared at the hearing on January 23, 1952, and on January 29, 1952 the IERB reversed the action of the PSB and informed petitioner and his employer that he was authorized to work on secret contract work.

On April 17, 1953, the Secretary of the Navy notified petitioner that he had concluded that petitioner's

continued access to classified Navy information was inconsistent with the best interest of national security, and requested ERCO to bar petitioner from all classified projects and information.[1] Petitioner was discharged by ERCO a week later. Following petitioner's request for reconsideration, the Navy informed him that it had requested the Eastern Industrial Personnel Security Board (EIPSB) to accept jurisdiction and to make a final determination concerning petitioner's status. On April 28, 1954, a hearing was held, and the EIPSB reached the same conclusion as had the Secretary. On September 15, 1955, petitioner requested review by the Industrial Personnel Security Review Board, and on March 12, 1956, he received a letter from the Director of the Office of Industrial Personnel Security Review affirming the determination of the EIPSB.

Petitioner then brought an action in the United States District Court for the District of Columbia seeking a declaration that the revocation of his clearance was unlawful and appropriate injunctive relief. On June 29, 1959, this Court held that, "in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." *Greene* v. *McElroy*, 360 U.S. 474, 508. On remand, the district court entered a consent order which (1) declared the final revoca-

[1] At the time the Secretary acted, the PSB and IERB had been abolished. See *Greene* v. *McElroy*, 360 U.S. 474, 480–483.

tion of petitioner's security clearance to be unauthorized; and (2) directed the expunging of all rulings, orders or determinations wherein or whereby the clearance was revoked (R. 3; Pet. Br. 3–4).

Thereafter, on December 28, 1959, petitioner made a demand on the General Counsel of the Department of the Navy for monetary restitution under paragraph 26 of the former (1955) Industrial Personnel Security Review Regulation, 20 Fed. Reg. 1553, § 67.5–4, Appendix, *infra*, p. 33 (R. 4). The General Counsel acknowledged receipt of this demand on January 11, 1960 (R. 4), and on April 20, 1960, petitioner supplied the General Counsel with additional information and claimed a loss of earnings of $49,960.41, from the date of dismissal to December 31, 1959 (R. 4).

Pursuant to express authority from the President (Executive Order 10865, February 20, 1960, 25 Fed. Reg. 1583), the Secretary of Defense, on July 28, 1960, issued a new Industrial Personnel Access Authorization Review Regulation (25 Fed. Reg. 7523). Responding to the Court's criticism in *Greene* v. *McElroy, supra,* the new procedures (§ 67.4–5(b), Appendix, *infra,* pp. 35–38) accorded the right of cross-examination in all cases, with the limited exceptions expressly authorized by the President. Section 67.5–2(a) of the regulation provided for reconsideration, at the employee's request, of cases in which a final determination of denial or revocation was based on a proceeding which was found to have been unauthorized at the time it was made (Appendix, *infra,* p. 38). In section 67.5–3, the regulation provided for monetary restitu-

tion for loss of earnings resulting directly from a suspension, revocation, or denial of access authorization, in the event it was ultimately determined that the employee was entitled to security clearance and that the initial contrary ruling was unjustified (Appendix, *infra*, pp. 32–39). The policy section of the regulations contained, however, a statement that such a favorable determination was not, in and of itself, an access authorization, nor was it in any sense a determination that the applicant concerned actually required access to classified information (§ 67.1–4(b), Appendix, *infra*, p. 34).

On February 8, 1961, the Director, in response to petitioner's request, gave him an opportunity to submit in writing additional material on his legal position with respect to his claim for monetary restitution under Paragraph 26 of the Directive of 1955. Further, the Director advised that the Department was prepared, at petitioner's request, to consider his case under the Industrial Personnel Access Authorization Review Regulation of July 28, 1960, and to take such action as might be necessary to reach a final determination as to petitioner's access authorization (R. 4).

On March 2, 1961, petitioner restated his position as to the applicability of the monetary restitution provision of the Regulation of February 2, 1955, and declined to request consideration of his case under the 1960 review regulation, on the ground that an adverse decision under the latter might foreclose his claim for loss of earnings under the earlier regulation (R. 5). Thereafter, in correspondence with petitioner, the Director reiterated the Department's willingness to undertake the processing of petitioner's

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case under the 1960 regulation. Petitioner did not make such request, and, on June 1, 1961, the Department of the Navy, to which he had originally presented his claim, advised petitioner that he "does not qualify for monetary restitution under the provisions of Paragraph 26 [of the 1955 regulation] and that, therefore, his claim, being premature, cannot be given further consideration at this stage of the administrative proceedings" (R. 5–6).

Petitioner commenced this action in the Court of Claims on May 7, 1962, claiming money damages based on the Fifth Amendment and Paragraph 26 of the 1955 regulation (R. 1). The government filed a motion to suspend proceedings on July 5, 1962 (R. 7), which motion was denied on September 5, 1962 (R. 8). On December 5, 1962, before the extended time for filing an answer had elapsed, the Commissioner of the Court of Claims entered an order suspending proceedings pending petitioner's pursuit of his administrative remedies in the Department of Defense (R. 9).[2]

Petitioner then requested review by the Court of Claims of the Commissioner's Order (R. 9). On December 20, 1962, the Court of Claims denied petitioner's request for review (R. 9).

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[2] As the Order recites, the Commissioner's action was premised on the similar course followed by the Court of Claims in the cases of *Stephen L. Kreznar* v. *United States* and *Novera H. Spector* v. *United States*, proceedings suspended December 5, 1962, now pending on petition for certiorari, No. 85, this Term.

ARGUMENT

INTRODUCTION AND SUMMARY

The central theme of petitioner's argument is summed up in the maxim he attributes to Mr. Justice Cardozo: "Illegality established, liability ensues." (Pet. Br. 35.) He argues, in effect, that when this Court held unauthorized the final revocation of his clearance to view government secrets, which, as a practical matter, deprived him of his job, he then became entitled, without more, to recover whatever economic damages resulted from the loss of that employment. In sum, his present contention suggests that, but for the awkward division of jurisdiction between the district courts and the Court of Claims, the original suit should have contained a prayer for damages, and that, upon remand from this Court, the trial court might have simply taken evidence on the extent of the injury and awarded a money judgment. But the matter is not so simple.

Read out of context, the quoted maxim no longer holds true. With respect to the government at least, there are a dozen instances where illegal or unauthorized action does *not* give rise to damages in favor of the person injured. One need only consult the text and the jurisprudence of the Tucker Act and the Tort Claims Act. See 28 U.S.C. 1491, 2680. Moreover, even if liability ultimately ensues, it may be limited or conditioned on a further showing. See, *e.g.*, 10 U.S.C. 1552; 28 U.S.C. 2513. And preliminary determination may be confided to the exclusive jurisdiction of an administrative tribunal. See, *e.g.*, 41 U.S.C. 113; 42 U.S.C. 405 (g)–(h); 46 U.S.C. 740,

1292. See, also, 31 U.S.C. 71; 28 U.S.C. 2675. That is this case.

Here, the finding that petitioner was improperly deprived of his job does not automatically accrue a right to recover damages for lost earnings. As we will show, no such right as against the United States exists at all, except insofar as it was granted by Regulations of the Department of Defense. Under the Constitution and the stautory law, the government is no more liable here than it is when a criminal judgment is vacated because the trial was infected with error (albeit of constitutional proportions) and the defendant loses his job as a result of the wrongful conviction. At the very least, the claim must abide the outcome of the retrial. See 28 U.S.C. 2513.

Indeed, that is the rule embodied in the Department regulations. As one would expect, before restitution is allowed, those regulations require a further showing, at the administrative level, that the challenged revocation of access authorization was not only procedurally incorrect, but substantively wrong. The reason is that, though the final revocation was accomplished under inadequate procedures, there remains the question whether the procedural error is the cause of the revocation, or whether, tested by correct procedures, his clearance still should have been finally revoked, in which event his losses can hardly be attributed to the government's action in achieving the right result by the wrong means. In short, before damages are due, it must be established that there would have been no damages but for the government's wrongful act.

Under the circumstances, the administrative remedy

seems wholly adequate. At the very least, there is no sufficient excuse for not initially submitting the claim to the Department's procedures. Petitioner having refused to exhaust that remedy, his suit is premature. We submit that the court below was plainly correct in requiring that this be done before it undertook to review the administrative determination or to entertain novel constitutional claims.

I.

THE COURT BELOW PROPERLY SUSPENDED JUDICIAL PROCEEDINGS PENDING EXHAUSTION OF AN AVAILABLE AND ADEQUATE ADMINISTRATIVE REMEDY

The existence of an administrative remedy is not disputed. Indeed, petitioner's claim (R. 1, 4, 7) is founded in part on Paragraph 26 of a Department of Defense Directive issued in 1955 (former § 67.5–4 of the Industrial Personnel Security Review Regulation, Appendix, *infra* p. 33), which, under stated circumstances, requires the affected military department to "reimburse the contractor employee in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance." And the current regulation, in effect since July 1960, makes like provision for monetary restitution (§ 67.5–3, Appendix, *infra* pp. 38–39). Since, as we show, both versions of the regulation contemplate further departmental proceedings, the Court of Claims quite properly required petitioner to pursue his administrative remedy before ruling on his novel constitutional claims.

That course is permissible in most cases even where no constitutional issue is involved. "[T]he long settled rule of judicial administration [is] that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51. See, also, *Natural Gas Company* v. *Slattery*, 302 U.S. 300, 311. But judicial abstention is particularly appropriate where, as here, the administrative determination might moot a constitutional question. See *Aircraft & Diesel Equipment Co.* v. *Hirsch*, 331 U.S. 752, 772–774; *Beard* v. *Stahr*, 370 U.S. 41. It seems almost compelled in a case like this one where this Court has deliberately avoided decision of the underlying constitutional issues.

What, then, is petitioner's answer? Initially, he complains that the required procedures are burdensome and will postpone recovery. Those considerations might be determinative if, as in the cases petitioner cites, this were a suit to enjoin continued interference with the exercise of a declared constitutional right. See, *e.g.*, *California Comm'n* v. *United States*, 355 U.S. 534. But the present complaint is no longer addressed to the extraordinary relief of equity. Whatever invasion of right was involved has long since been enjoined; what remains is an ordinary suit for damages which tolerates the normal delays of deliberate legal process. Moreover, as our examination will show, the claim made outside the regulations stands upon the most dubious footing. No injustice will be done if its assertion is a little delayed.

More to the point, petitioner makes two further objections. First, he insists that he has in fact exhausted the only appropriate administrative remedy and is now entitled to review of the arbitrary denial of his claim by the Department of Defense. Then, somewhat alternatively, he argues that the suggested administrative remedy is inadequate for a variety of reasons. We shall consider each of these contentions in turn.

1. Under the 1955 regulation, the obligation to make monetary restitution arises when "a final determination is favorable to a contractor employee" whose security clearance was originally suspended (Appendix, *infra* p. 33). Construing this Court's ruling in *Greene* v. *McElroy*, 360 U.S. 474, or the district court's order on remand "expunging" the earlier revocation of his security clearance (*supra*, pp. 3–4), as such "a final determination," petitioner argues that all he need do to obtain the relief promised by the regulation is to file a claim with the Defense Department, which he has done. The current regulation (Appendix, *infra*, pp. 33 ff), which he concedes contemplates further administrative proceedings, petitioner says cannot be invoked against him since his claim was filed before it became effective.

Pretermitting the last point, petitioner's argument founders on a misconception of the 1955 regulation on which he relies. Very plainly, the "favorable" "final determination" of which the provision speaks is a restoration of eligibility for access to classified information. That reading is compelled by the context. The restitution provision is part of a regulation which

deals exclusively with the grant or denial of authorization for access to government secrets. More particularly, the section in question follows a series of provisions dealing with the review of a preliminary denial or revocation of clearance, ending with the "determination" of the Review Board, which "shall be final" subject to reconsideration or reversal by the Secretary of Defense. See 32 C.F.R. (1954 ed., Jan. 1, 1960, Pocket Supplement), § 67.4–8. Obviously, the section invoked is concerned with the injury resulting from a suspension of access authorization which is later administratively terminated.

Thus, the prerequisite to monetary restitution under the regulation is an end of the suspension, a closing of the interim. That has not happened here. As petitioner concedes (Pet. Br. 24), and as Mr. Justice Harlan stated in his concurring opinion, "there is nothing in the Court's opinion [in *Greene* v. *McElroy*] which suggests that petitioner must be given access to classified material." 360 U.S. at 510. Nor could there be. Finding only that the Department's action was procedurally defective, the Court did not have occasion to determine, as a matter of law, that there was no sufficient basis for final revocation of petitioner's access authorization. While the analogy to a criminal proceeding is not altogether satisfactory, the Court in effect vacated the judgment, leaving the charge and resulting suspension in effect, and remanded the matter for a "new trial" by correct proceedings, should petitioner wish to pursue the case.

The short of it is that, while petitioner is free to let matters stand, to bring himself within the regula-

tion he invokes he must at least show that he was entitled to clearance during the period for which he claims damages by reason of the denial of clearance. That is what the 1960 provision expressly requires. But, whether his claim is judged under the old or the new regulation, under the circumstances of petitioner's case, the test is the same. As the current provision makes plain, that determination is properly one to be made at the administrative level. Improved procedures are available for that purpose. They have repeatedly been offered to petitioner. Even now, the remedy is open. Petitioner has not been denied; he has simply declined to exhaust the tendered procedures.

2. The claim that the proffered remedy is inadequate is quickly disposed of. The short answer is that given by this Court in *Gusik* v. *Schilder*, 340 U.S. 128, 133, "If [the suggested administrative proceeding] proves to be [futile], no rights have been sacrificed." The announced fear that resort to the proceedings required by the regulations will be construed as a "waiver" of judicial rights is chimeric. If nothing else, this Court stands in the way. But, in any event, there is no merit in petitioner's complaints.

What has already been said answers the objection that a finding of past and present eligibility for security clearance is inappropriate when the claimant neither needs nor asks for clearance. As the present regulation makes clear, actual access is not involved; the required determination is simply that an authorization "would be" granted upon de-

mand and a showing of need.[5] The current regulation, it is true, also requires a finding that the former administrative determination was "unjustified." But, though it might be appropriate in petitioner's case because of the long interval involved,[6] the Department of Defense advises us that no such showing will be required here, in light of the fact that petitioner's claim was initially filed under the 1955 regulation, at a time when the actual practice was not to undertake a separate review of the correctness of the initial decision.[7]

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[5] See, also, § 67.1–4(b) of the 1960 regulation (Appendix, *infra*, p. 34): "A determination under this Part 67 favorable to an applicant is not, in and of itself, an access authorization; nor is it in any sense a determination that the applicant concerned actually requires access to classified information."

[6] Petitioner is less than clear about the period for which he claims damages. Originally (R. 7), he demanded the amount payable under the 1955 regulation to the date of the filing of his petition in the Court of Claims plus an "equal amount" for future loss of earnings. Now, however, he seems content with compensation for the period covered by the monetary restitution provision of the old regulation, which ends, at the latest, on the date his qualification for security clearance is administratively declared. In any event, it is plain that no damages can be recovered for loss of earnings after restoration of clearance. The period involved, in any case, covers over ten years (petitioner's discharge from employment, resulting from final revocation of his clearance, having been effected on April 23, 1953), and the amount is substantial (see R. 6).

[7] So saying, we do not intend to bind the Department's procedure in a different case. The additional requirement of the 1960 monetary restitution provision is not deemed applicable to petitioner's case only because his claim, filed under the former rule, was not finally rejected until after the new regulation became effective and it is thought fair to accord the full substantive benefits of the earlier provision, while, at the same time, providing the more generous procedural safeguards now in force.

We do not understand petitioner to contest the adequacy of the award which might be forthcoming under the 1955 regulation. Nor is there any basis for such a complaint. The restitution provision requires reimbursement "for any loss of earnings" "not [to] exceed the difference between the amount the contractor employee would have earned at the rate he was receiving on the date of suspension and the amount of his interim net earnings" (Appendix, *infra* p. 33). That is clearly the fair measure of the damages incurred. Indeed, this Court so ruled in dismissing as moot the petition in *Taylor* v. *McElroy*, 360 U.S. 709, on the understanding that the claimant there would be paid in accordance with the same regulation.

Petitioner objects, however, to the apparently discretionary provision for restitution in the current regulation, under which he assumes his claim will be decided if he submits it to the Department of Defense. We do not so read the correspondence between the Department and petitioner. But, in any event, we are assured by those responsible that reimbursement will not be withhheld if petitioner makes the showing required by the 1955 regulation, as we have outlined it here. Of course, his eligibility will be determined in accordance with the current liberal procedures; but no right to restitution available under the former regulation will be denied.

There is, in sum, no obstacle to the pursuit of available and plainly adequate administrative proceedings. The action of the court below, remitting petitioner to those remedies, seems plainly correct.

II.

IN ANY EVENT, THERE IS NO PRESENT RIGHT TO DAMAGES OUTSIDE THE REGULATIONS OF THE DEPARTMENT OF DEFENSE

The argument just concluded demonstrates, we submit, that, whatever petitioner's rights may be, the court below properly required him, in the first instance, to exhaust available administrative remedies. But the result is the same if his alternative claims are now considered. The fact is that, outside the regulations, there is no basis for petitioner's claim to damages. At least, no cause of action has yet matured.

A. THIS COURT DECLARED NO SUCH RIGHT TO DAMAGES IN GREENE V. MCELROY

We fully agree with petitioner that the "critical and the only holding in the *Greene* case was 'that in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination.'" 360 U.S. at 508 (Pet. Br. 22). Accordingly, the Court declared void the Defense Department's action in finally revoking petitioner's security clearance and directed the district court to enter appropriate orders. In obedience to the mandate, the district court ordered the final revo-

cation "expunged" from the records (R. 3; Pet. Br. 4, n. 1). There is in this not one hint that petitioner is "therefore" entitled to damages.*

Of course, the Court noted that petitioner had suffered a pecuniary loss by reason of the withdrawal of his security clearance. But that merely justified the intervention of equity, since "[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Beacon Theatres* v. *Westover*, 359 U.S. 500, 506–507. Indeed, while we hesitate to join petitioner in guessing the Court's unspoken assumptions, it would seem that the injunction was appropriate, at least in part, because petitioner had no clear right to compensation by way of damages. Cf. *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 585.

Nor does the Court's opinion supply the necessary predicate for a money award. Albeit the Court found constitutionally protected "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference,"

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* True, Mr. Justice Clark, in dissent, expressed some fear that petitioner might recover damages. See 360 U.S. at 513, 523–524. Of course, insofar as the Justice was merely predicting the outcome of subsequent administrative proceedings, as the reference to *Taylor* v. *McElroy*, 360 U.S. 709, suggests, there is no assertion of an "automatic" right to "restitution." The analogy to *Vitarelli* v. *Seaton*, 359 U.S. 535, on the other hand, seems misplaced, since the claimant there, unlike the present petitioner, was a government employee who was ordered reinstated by this Court and thus became eligible for back-pay under an express statutory provision. See 5 U.S.C. 22–1. It is needless to add that this dissenting view can hardly be made the premise for a broad reading of the Court's holding.

360 U.S. at 492, it expressly declined to rule that the government's action was procedurally or substantively unconstitutional, characterizing it only as "unauthorized." 360 U.S. at 508. Much less did the Court decide, or even intimate, that the denial of access to government secrets, under the circumstances, amounted to a "taking" for which "just compensation" was due under the Fifth Amendment. There is accordingly no basis whatever in this Court's opinion in the former case for petitioner's present claim under the Constitution.

Nor does the holding that the procedures followed were unauthorized, of itself, give a right to recover damages. For, as we show, the government is not usually accountable in money for acts which are merely unauthorized, and the exception made here by the Defense regulations requires a further finding which this Court could not, and did not, make. Indeed, petitioner himself says the Court "rejected any notion that [he] was * * * entitled to a ruling restoring his access authorization" merely because the final revocation of the clearance was procedurally defective (Pet. Br. 24). See the concurring opinion of Mr. Justice Harlan, 360 U.S. at 510. Yet, as we have seen, that is precisely the ruling which the applicable regulations require before the right to "restitution" accrues. Quite properly, the Court left that determination to the agency concerned, where it belonged.

B. THE FIFTH AMENDMENT GRANTS NO SUCH RIGHT TO DAMAGES

We have already indicated our view that the court below properly declined to resolve the undecided con-

stitutional questions until petitioner had exhausted available administrative remedies which might moot the case. We urge additionally, if the Court should find it appropriate to reach the question, that there is no basis here for an award under the Fifth Amendment.

1. It is not clear whether petitioner asserts a claim under the Due Process Clause of the Fifth Amendment, or only under the Just Compensation Clause (Compare R. 1, 6–7, 10–11 with Pet. 18–20 and Pet. Br. 29). In the premises, however, no Due Process claim can prevail. There is the gravest doubt whether recovery of damages on account of governmental action is ever available on the sole ground that the Bill of Rights has been violated.[7] While this Court has left the question open, see *Bell* v. *Hood*, 327 U.S. 678; *Wheeldin* v. *Wheeler*, 373 U.S. 647, every reported decision directly ruling on it has denied the existence of any such cause of action. *Bell* v. *Hood*, 71 F. Supp. 813 (S.D. Cal.); *Johnston* v. *Earle*, 245 F. 2d 793 (C.A. 9); *Dupree* v. *United States*, 141 F. Supp. 773, 136 Ct. Cls. 57. But, even if the right exists in some cir-

[7] The early cases of *Wiley* v. *Sinkler*, 179 U.S. 58, 64–65, and *Swafford* v. *Templeton*, 185 U.S. 487, 491–493, ruling that, on a proper complaint followed by sufficient proofs, damages may be recovered against the offending officials on account of a denial of the right to vote in a congressional election, are distinguishable. Those decisions are premised on the distinction, first recognized in *Ex parte Yarbrough*, 110 U.S. 651, and reaffirmed in *United States* v. *Classic*, 313 U.S. 299, 314–315, between the "affirmative" rights conferred by the original Constitution (here, Art. 1, § 2), and those which are merely protected against governmental invasion—the "negative" rights of the Bill of Rights and the Fourteenth Amendment.

cumstances, there are insurmountable obstacles to recovery here.

In the first place, it has not been shown that petitioner was ever denied constitutional due process. This Court advisedly refrained from holding that the procedures under which petitioner's security clearance was revoked, if authorized by the President or by Congress, would violate the Fifth Amendment. The decisions recognizing the special problems of national security and the necessarily broad scope of governmental discretion in this area suggest that the requirements of due process were satisfied here. See *Totten* v. *United States*, 92 U.S. 105; *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537; *Carlson* v. *Landon*, 342 U.S. 524; *United States* v. *Reynolds*, 345 U.S. 1; *Slaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206; *Jay* v. *Boyd*, 351 U.S. 345; *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886. Cf. *Hannah* v. *Larche*, 363 U.S. 420.

Moreover, even assuming a violation of the Fifth Amendment, it would seem a prerequisite to recovery of damages to show that the injury is attributable to the procedural defect and would not otherwise have been incurred. As the Court of Claims said in *Dupree's* case, *supra*, where the claimant had been denied authority to act as a ship's master on security grounds under procedures which the court assumed unconstitutional: "If it is possible at all in a case such as this to state a case founded on the Constitution, it would, at least, be necessary to allege facts to show that, except for this violation of his constitutional rights, the certificate could have been granted him, and he would have

been permitted to follow his vocation and would have earned the wages for which he sues." 141 F. Supp. at 776, 136 Ct. Cls. at 61.

Finally, there is the obstacle of sovereign immunity, not involved in *Bell* v. *Hood* or *Wheeldin* v. *Wheeler*.* Though the Tucker Act, 28 U.S.C. 1346, 1491, permits suits against the United States "founded * * * upon the Constitution," that provision has never been understood to waive governmental immunity except for claims under the Just Compensation Clause of the Fifth Amendment. Whatever the status of the offending officers, compare *Barr* v. *Matteo*, 360 U.S. 564, with *Wheeldin* v. *Wheeler*, *supra*, the United States itself remains immune from damage claims arising out of the unauthorized or tortious acts of its agents, though constitutional rights are invaded. One view is that the final phrase of the Tucker Act, "not sounding in tort," qualifies the whole provision. *Schillinger* v. *United States*, 155 U.S. 163; but see, *Dooley* v. *United States*, 182 U.S. 222, 224. But, whether under this rationale or another, the rule is well settled. *Hooe* v. *United States*, 218 U.S. 322; *Basso* v. *United States*, 239 U.S. 602; *Ball Engineering Co.* v. *White & Co.*, 250 U.S. 46, 57; see *United*

* In *Bell* v. *Hood* recovery was sought against F.B.I. agents in their individual capacities, and in *Wheeldin* v. *Wheeler* the damage claim was asserted against an investigator of the House Un-American Activities Committee who, it was conceded, was not acting sufficiently within the scope of his authority to bring into play the immunity doctrine of *Barr* v. *Matteo*, 360 U.S. 564. In both cases, the suit was filed in the district court under the general "federal jurisdiction" provision, now 28 U.S.C. 1331, not, as here, in the Court of Claims under the Tucker Act.

States v. *North American Co.*, 253 U.S. 330, 333; *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 585; *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 166, n. 12. Accordingly, insofar as the present claim against the government rests on a supposed violation of the Due Process Clause, there is no jurisdiction to entertain it,* and, in any event, the suit is barred by the principles of sovereign immunity, consent having been withheld.

2. This brings us to the claim asserted under the Just Compensation Clause of the Fifth Amendment (Pet. Br. 29). While some of the same considerations apply, additional obstacles, plainly insurmountable, defeat recovery on this ground. Petitioner's assumption to the contrary notwithstanding, it does not follow from the premise that the right to pursue one's occupation free of unwarranted governmental interference "comes within the 'liberty' and 'property' concepts [of the Due Process Clause] of the Fifth

* Even if the Fifth Amendment contemplated a recovery in damages for violation of the due process guarantee, the complaint would not lie unless jurisdiction to entertain it has been conferred by Congress. That is true even where waiver of sovereign immunity is not involved, as the discussion in *Bell* v. *Hood*, 327 U.S. at 680, 683, 685; and *Wheeldin* v. *Wheeler*, 373 U.S. at 649–652, plainly implies. The need for express jurisdictional power is all the greater when the suit is against the United States. *United States* v. *Sherwood*, 312 U.S. 584. Whatever latitude there may be to fashion a remedy when the sovereign is not sued (see the dissenting opinion of Mr. Justice Brennan in *Wheeldin* v. *Wheeler*, *supra*, at 653–667), the present claim, even if sanctioned by the Constitution, will not lie unless the Tucker Act gives the Court of Claims jurisdiction to hear it. See *United States* v. *North American Co.*, 253 U.S. 330, 335; *Lynch* v. *United States*, 292 U.S. 571, 582.

Amendment," 360 U.S. at 492, that the right is "private property" within the Just Compensation Clause, or that, under the present circumstances, it was "taken for public use."

So far as we are aware, no one has ever suggested that a purely abstract right of this character, which the government can in no sense appropriate to its own use, is susceptible of a "taking." On the contrary, it has been said that the word "property" in the Just Compensation Clause was intended "to denote the group of rights inhering in the citizen's relation to *the physical thing*, as the right to possess, use and dispose of it." *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (emphasis added). While that description may be too narrow, see *e.g.*, *James* v. *Campbell*, 104 U.S. 356 (patent rights); *Lynch* v. *United States*, 292 U.S. 571 (contract rights), it is clear that not all "economic interests," *United States* v. *Willow River Co.*, 324 U.S. 499, 502, indeed, not all "rights," *U.S. ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 279–283, qualify as "private property" under the Fifth Amendment. Before a right is compensable under the Constitution it must at least be susceptible of transfer. *Kimball Laundry* v. *United States*, 338 U.S. 1, 5. For, otherwise, it can of course have no "market value," which is the measure of the compensation due. See *United States* v. *Miller*, 317 U.S. 369. Plainly, the negative right here alleged to have been invaded is not "property" for which the government owes compensation.

Nor was there a "taking" in the constitutional sense. On the face of it, it seems absurd to speak of the gov-

ernment's "acquiring" a purely personal right, and one that runs *against* the government. It is true that destruction of property is sometimes assimilated to a "taking," but in those cases the interest affected is at least susceptible of acquisition. See, *e.g.*, *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166 (destruction of land by flooding); *United States* v. *Welch*, 217 U.S. 333 (closing of a private right of way); *United States* v. *Causby*, 328 U.S. 256 (damage to land by overflights). Here, the supposed governmental invasion of a constitutional right no more qualifies as a taking than the "frustration" of an enterprise ruled noncompensable in *Omnia Co.* v. *United States*, 261 U.S. 502, and *United States* v. *Grand River Dam Authority*, 363 U.S. 229. Cf. *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155.

Moreover, even if it can be said that the government officials involved had the requisite intent to take, see *Tempel* v. *United States*, 248 U.S. 121; *Mitchell* v. *United States*, 267 U.S. 341, 345; *United States* v. *Central Eureka Mining Co.*, *supra*, at 166, the action, being unauthorized, could not render the United States liable under the Just Compensation Clause. *Schillinger* v. *United States*, 155 U.S. 163, 168; *Ball Engineering Co.* v. *White & Co.*, 250 U.S. 46, 54–57; *United States* v. *North American Co.*, 253 U.S. 330, 333; *Mitchell* v. *United States*, *supra*; *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 585; *United States* v. *Central Eureka Mining Co.*, *supra*, at 166, n. 12. The logic of the rule is incontestable: the subject matter of the Just Compensation Clause is the power of eminent domain, *Bedford* v. *United States*, 192 U.S. 217, 224;

United States v. *Carmack*, 329 U.S. 230, 241–242; that power is preeminently an attribute of sovereignty, *United States* v. *Jones*, 109 U.S. 513, 518; *Louisiana Power & Light Co.* v. *Thibodaux City*, 360 U.S. 25, 28; the sovereign, being the source of authority, is incapable of *ultra vires* acts; unauthorized takings are therefore not exercises of the power of eminent domain and the sovereign accordingly is not accountable under the Just Compensation Clause. The reasons of policy are equally plain: a reading of the Just Compensation Clause of the Fifth Amendment which permitted recovery against the United States on account of tortious appropriations by its officers would, in effect, circumvent the whole principle of sovereign immunity and force upon the government all manner of suits to which it had never consented.[10] The enormity of the consequences is obvious if every invasion of any right—by definition unauthorized—is assimilated to a taking for which the government owes compensation.

[10] There is, of course, no necessary contradiction between the proposition stated and the rule that sovereign immunity does not bar suits with respect to official action which is unauthorized or taken pursuant to unconstitutional authority. See *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 702; *Malone* v. *Bowdoin*, 369 U.S. 643, 647. Both rules are founded on the premise that the sovereign itself is incapable of unauthorized or unconstitutional action, and the question in each instance is whether, tested on this premise, the act complained of is properly attributed to the sovereign. In the first case, consent having been given, the consequence of an affirmative answer is that the suit will lie against the sovereign; in the second, the same answer will bar the suit against the official on the ground that he stands in the shoes of the sovereign, which has not waived its immunity.

See *Schillinger* v. *United States, supra,* at 168.[11] That result is plainly inconsistent with the enactment, and the limitations, of the Tort Claims Act. It degrades the spontaneous decision of a generous Congress by labelling it a grudging and inadequate response to constitutional compulsion. There is no warrant for such an extravagant rewriting of the Fifth Amendment guarantee of just compensation for private property taken for public use.

We conclude that petitioner has stated no cause of action "founded on the Constitution" within the jurisdiction of the Court of Claims.

C. THERE IS NO OTHER BASIS FOR SUCH A RIGHT TO DAMAGES

In light of the pleadings, it seems unnecessary to explore the matter further. The petition filed in the

[11] Mr. Justice Brewer, speaking for the Court, put the argument forcibly:

"It is said that the Constitution forbids the taking of private property for public uses without just compensation; that therefore every appropriation of private property by any official to the uses of the government, no matter however wrongfully made, creates a claim founded upon the Constitution of the United States and within the letter of the grant in the act of 1887 of the jurisdiction to the Court of Claims. If that argument be good, it is equally good applied to every other provision of the Constitution as well as to every law of Congress. This prohibition of the taking of private property for public use without compensation is no more sacred than that other constitutional provision that no person shall be deprived of life, liberty, or property without due process of law. Can it be that Congress intended that every wrongful arrest and detention of an individual, or seizure of his property by an officer of the government, should expose it to an action for damages in the Court of Claims? If any such breadth of jurisdiction was contemplated, language which had already been given a restrictive meaning would have been carefully avoided."

Court of Claims expressly invokes only "Sections 1491(1) and (3), Title 28, United States Code" (R. 1). As a reference to the Annotated Edition of the Code makes clear, the claim thereby stated is one "[f]ounded upon the Constitution" (28 U.S.C.A. 1491(1)) or "[f]ounded upon any regulation of an executive department" (28 U.S.C.A. 1491(3)). Petitioner has never sought to enlarge his complaint. In his request for review of the Commissioner's order in the court below (R. 10–11), in his petition for certiorari (pp. 20–21), and in his brief to this Court (pp. 30, 38), he has steadfastly adhered to the constitutional and regulatory bases for his claim, without suggesting any additional ground for relief. Accordingly, having found the one claim wholly without merit and the other prematurely asserted, there is perhaps no occasion to pursue other shadowy paths. But, in any event, no alternative avenue of recovery exists.

Quite plainly, there is no "Act of Congress" upon which to found a claim. Nor can petitioner invoke an "express or implied contract with the United States" within the meaning of the Tucker Act. 28 U.S.C. 1491. Unlike a government employee, the present suitor has no colorable claim to a contract relationship with the United States, tacit or express. See *United States* v. *Driscoll*, 96 U.S. 421. And, of course, it is well settled that a contract "implied in law," or "quasi-contract," is no basis for recovery under the Tucker Act. *Russell* v. *United States*, 182 U.S. 516; *United States* v. *Holland-America Lijn*, 254 U.S. 148, *United States* v. *Minnesota Mut. Inv. Co.*, 271 U.S. 212; *State of Alabama* v. *United States*, 282

U.S. 502. See, also, *Dupree* v. *United States*, 141 F. Supp. 773, 136 Ct. Cls. 57. Finally, there is no basis for a claim under the last clause of the Tucker Act which allows recovery of "liquidated or unliquidated damages in cases not sounding in tort." The obvious reason is that the conduct alleged, if it gives rise to any cause of action, amounts to a tortious interference with contract rights. See Prosser, *Torts*, § 106, pp. 722–725. And, of course petitioner cannot avoid the exclusion of tort claims by "waiving the tort" and proceeding on a different theory. *Hill* v. *United States*, 149 U.S. 593, 598; *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381.

Needless to say, the tort claim itself was not within the jurisdiction of the court below. See 28 U.S.C. 1346(b). But it could fare no better in the district court, for the Tort Claims Act expressly bars "[a]ny claim based upon an act * * * of an employee of the Government, exercising due care, in the execution of a * * * regulation, whether or not such regulation be valid," 28 U.S.C. 2680(a), and "[a]ny claim arising out of * * * interference with contract rights," 28 U.S.C. 2680(h). See *Dupree* v. *United States*, 247 F. 2d 819, 821 (C. A. 3), affirming, 146 F. Supp. 148 (E.D. Pa.); *id.*, 264 F. 2d 140 (C.A. 3), certiorari denied, 361 U.S. 921.

The short of it is that petitioner has no apparent foundation for the recovery of damages outside the regulations of the Department of Defense. In the circumstances, he is surely not prejudiced by a ruling which requires him to exhaust the available adminis-

trative remedy before his dubious claim on other grounds is considered by the Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the order below should be affirmed and that the cause should be remanded to the Court of Claims, there to be held to abide the outcome of appropriate administrative proceedings.

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OCTOBER 1963.

APPENDIX

1. Amendment V to the Constitution of the United States, in pertinent part, provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *.

2. The Tucker Act, 28 U.S.C. 1491, in pertinent part, provides:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

3. Pertinent regulations of the Department of Defense provide as follows:

A. Pertinent portions of Department of Defense Directive 5220.6, dated February 2, 1955, Industrial Personnel Security Review Regulation, 20 Fed. Reg. 1553, provide:

> § 67.1–1 *Purpose.* This part prescribes the uniform standard and criteria for determining the eligibility of contractors, contractor employees, and certain other individuals as set forth in this part, to have access to classified defense information. It also establishes the administrative procedures governing the disposition of all cases in which a military department, or activity thereof, has made a recommendation or determination (a) with respect to the denial, suspension or revocation of a clearance of a contractor or contractor employee, and (b) with respect to the denial or withdrawal of authorization for access by certain other individuals.
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> * * * * *
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> § 67.1–3 *Policy.* (a) While the Department of Defense will assume, unless information to the contrary is received, that all contractors and contractor employees are loyal to the Government of the United States, the responsibilities of the military establishment necessitate vigorous application of policies designed to minimize the security risk incident to the use of classified information by such contractors and contractor employees. Therefore, adequate measures will be taken to provide continuing assurance that no contractor or contractor employee will be granted a clearance if available information indicates that the granting of such clearance may not be clearly consistent with the interests of the national security. At

the same time, every possible safeguard within the limitations of national security will be provided to ensure that no contractor or contractor employee will be denied a clearance without an opportunity for a fair hearing.

(b) The denial or revocation of a clearance in and of itself does not necessarily carry any implication that the individual is disloyal to the United States. Denial or revocation results from a determination that the granting of a clearance is not clearly consistent with the interests of the national security. Such a determination would, of course, be made in the case of a disloyal individual. However, there are many other reasons, unrelated to loyalty, which may result in such a determination and thus require the denial or revocation of a clearance. Since a clearance relates only to access to classified defense information, the denial or revocation of a clearance to a contractor or contractor employee does not preclude his participation in unclassified work.

§ 67.1–4 *Release of information.* All personnel in the Program will comply with applicable directives pertaining to the safeguarding of classified information and the handling of investigative reports. No classified information, nor any information which might compromise investigative sources or methods or the identity of confidential informants, will be disclosed to any contractor or contractor employee, or to his lawyer or representatives, or to any other person not authorized to have access to such information. In addition, in a case involving a contractor employee the contractor concerned will be advised only of the final determination in the case to grant, deny, or revoke clearance, and of any decision to suspend a clearance granted previously pending final determination in the case. The contractor will not be given a copy of the Statement of Reasons issued to the contractor employee except

at the written request of the contractor employee concerned.

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§ 67.5–4 *Monetary restitution.* In cases where a final determination is favorable to a contractor employee, the department whose activity originally forwarded the case to the Director will reimburse the contractor employee in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance. Such amount shall not exceed the difference between the amount the contractor employee would have earned at the rate he was receiving on the date of suspension and the amount of his interim net earnings. No contractor employee shall be compensated for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under this part.

B. Pertinent portions of Department of Defense Directive 5220.6 dated July 28, 1960, Industrial Personnel Access Authorization Review Regulation, 25 Fed. Reg. 7523, provide:

§ 67.1–1 *Authority.*

Part 67 is issued pursuant to the authority vested by law, including Executive Order 10865 (reproduced as Appendix A), in the Secretary of Defense. * * *

* * * * * *

§ 67.1–4 *Policy.*

(a) The responsibilities of the Department of Defense, including those imposed by the President in Executive Order 10865, necessitate application of policies designed to minimize the possibility of compromise incident to placing classified information in the hands of industry. Adequate measures will be taken to insure that no person is granted, or is allowed to retain, an authorization for access to classified information unless the available informa-

tion justifies a finding that such access authorization, at the specific classification category granted, is clearly consistent with the national interest.

(b) A determination that granting or retaining authorization for access to information of a specific classification category is not clearly consistent with the national interest shall result in denying or revoking authorization for such access. Any determination under this Part 67 adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned. A determination under this Part 67 favorable to an applicant is not, in and of itself, an access authorization; nor is it in any sense a determination that the applicant concerned actually requires access to classified information. Since an access authorization relates only to access to classified information, denying or revoking such an authorization does not preclude participation in unclassified work.

(c) In the absence of the power to subpoena witnesses, the Secretary of Defense, through the Director, Office of Industrial Personnel Access Authorization Review, may issue in appropriate cases invitations and requests to appear and testify, and may defray reasonable and necessary expenses incurred by such witnesses, in order that the applicant may have the opportunity for cross-examination provided by this Part 67. So far as the national security permits, investigative agencies under the control of the Department of Defense shall cooperate by identifying to the Office of Industrial Personnel Access Authorization Review, persons who have made statements adverse to the applicant and by assisting in making such persons available for cross-examiantion.

(d) All personnel involved in the processing of cases under the Industrial Personnel Access Authorization Review Program shall com-

ply with the applicable directives pertaining to the safeguarding of classified information and the handling of investigative reports. No classified information, nor any information which might compromise investigative sources or methods or the identity of confidential informants, shall be disclosed to any applicant, or to his counsel or representatives, or to any other person not authorized to have access to such information. In cases involving individual applicants, the employer concerned may be advised only of the final determination in the case and of any interim decision to suspend an access authorization previously granted. Except at the written request of the applicant, the Department of Defense shall not release copies of the Statement of Reasons or findings relative thereto outside of the Executive Branch of the Government.

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§ 67.4 *Processing of cases.*

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§ 67.4–5 *Procedures for personal appearance proceedings.*

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(b) *Introduction of information.* (1) The record shall consist exclusively of all information presented by the Department of Defense in accordance with this Part 67, together with all information submitted by the applicant. The record shall not be limited to evidence admissible in the courts of the United States. Any oral or documentary evidence may be received if otherwise admissible under this Part 67 and accorded the weight deemed appropriate, but irrelevant, immaterial, or unduly repetitious material may be excluded, in the sound discretion of the Chairman of the field board. Efforts shall be made to obtain the best evidence available.

(2) Unless permitted by subparagraphs (5) and (6) of this paragraph, the record may

contain no information adverse to the applicant on any controverted issue unless (i) the information or its substance has been made available to the applicant and he offers no objection to its presentation; or (ii) the information or its substance is made available to him and the applicant is afforded an opportunity to cross-examine the person providing the information either orally or by written interrogatories. The foregoing shall not apply to information bearing upon the characterization in the Statement of Reasons of any organization or individual other than the applicant. Information the admission of which is not prohibited by this subparagraph (2), or by any other provision of this Part 67, may be received and made part of the record and may be considered by any board or official charged with making determinations under this Part 67.

* * * * *

(5) Records compiled in the regular course of business, or other physical evidence other than investigative reports as such, relating to a controverted issue, which, because they are classified, may not be inspected by the applicant, may be received and considered provided that (i) the Secretary of Defense or when appropriate, the Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration, or the Director, Office of Industrial Personnel Access Authorization Review, who has been designated as their special designee for that purpose pursuant to section 5b, Executive Order 10865, has made a preliminary determination that said physical evidence appears to be material, and that failure to receive and consider it would, in view of the level of access sought, be substantially harmful to the national security, and (ii) to the extent that the national security permits, a summary or description of said physical evidence shall be made available to the applicant. In every

such case, information as to the authenticity and accuracy of such physical evidence furnished by the investigative agency involved shall be considered.

(6) A written or oral statement by a person adverse to the applicant on a controverted issue, and not relating to the characterization in the Statement of Reasons of any organization or individual other than the applicant, may be received and considered without affording an opportunity to cross-examine the person making the statement only in circumstances described in either of the following subdivisions (i) and (ii), provided however that a summary of the statement as comprehensive and detailed as the national security permits shall be made available to the applicant:

(i) The head of the department supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his identity would be substantially harmful to the national interest.

(ii) The Secretary of Defense or when appropriate, the Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration, or the Director, Office of Industrial Personnel Access Authorization Review, who has been designated as their special designee for that particular purpose pursuant to paragraph 4a(2) of Executive Order 10865, has preliminarily determined, after considering information furnished by the investigative agency involved as to the reliability of the person and the accuracy of the statement concerned, that the statement concerned appears to be reliable and material, and has determined that failure to receive and consider such statement would, in view of the level of access sought, be substantially harmful to the national security and that the person who furnished the information cannot appear

to testify (*a*) due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant, or (*b*) due to some other cause determined by the Secretary or the Deputy Secretary of Defense, or when appropriate, by the Administrator or Deputy Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration to be good and sufficient.

* * * * *

§ 67.5–2 *Reconsideration of prior decisions.*

(a) Decisions rendered under any industrial personnel review program prior to the effective date of this Part 67 which denied or revoked an access authorization may be reconsidered by such boards as the Director deems appropriate at the request of the applicant, addressed through the Director, after a finding by the appropriate board that there is newly discovered evidence or that other good cause has been shown. Whenever a final determination of denial or revocation based upon a personal appearance proceeding is found to have been unauthorized at the time it was made, authority is hereby delegated to the Director, Office of Industrial Personnel Access Authorization Review, to vacate such final determination and all subsequent administrative action predicated thereon and to take such other steps as may be deemed necessary to complete reconsideration of the case.

* * * * *

§ 67.5–3 *Monetary restitution.*

If an applicant suffers a loss of earnings resulting directly from a suspension, revocation, or denial of his access authorization, and at a later time a final administrative determination is made that the granting to him of an access authorization at least equivalent to that which was suspended, revoked or denied, would

be clearly consistent with the national interest and it is determined by the board making a final favorable determination that the administrative determination which resulted in the loss of earnings was unjustified, reimbursement of such loss of earnings may be allowed in an amount which shall not exceed the difference between the amount the applicant would have earned at the rate he was receiving on the date of suspension, revocation, or denial of his access authorization and the amount of his interim net earnings. The filing and processing of any such claim shall be in accordance with such regulations as the Secretary of Defense may prescribe after consultation with the Administrators. As used herein, earnings shall not include profits. Payment shall be limited to claims administratively determined to be just and equitable. No applicant shall be compensated for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under any industrial personnel review program. Payments under this provision shall be in full satisfaction of any and all claims, of whatever nature they may be, which the applicant has or may assert against the United States, or the Department of Defense or any of its agencies or activities, or the Federal Aviation Agency, or the National Aeronautics and Space Administration, or any of them, by reason of or arising out of the suspension, revocation or denial of access authorization.